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7 Attorneys for Plaintiff
 Kimberley Johnston

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 **Kimberley Johnston**, an Arizona
 11 resident,

Case No.

12 Plaintiff,

13 **VERIFIED COMPLAINT**

14 v.
 15 **Fender Musical Instruments**
 16 **Corporation**, a Delaware Corporation,

(Jury Trial Requested)

17 Defendant.

18
 19 Plaintiff Kimberley Johnston (“**Johnston**”), for her Verified Complaint against
 20 Defendant Fender Musical Instruments Corporation (“**Fender**”), hereby alleges as follows:

21 **PARTIES**

22 1. Plaintiff is, and at all times relevant hereto was, a resident of Maricopa
 23 County, Arizona. At all times relevant to this lawsuit, Johnston was an “employee” of
 24 Fender as defined in the Americans with Disabilities Act and the Americans with
 25 Disabilities Act Amendments Act, 42 U.S.C.A. § 12101, *et seq.* (collectively referred to
 26 herein as the “**ADA**”).

27 2. Upon information and belief, Fender is authorized to conduct business and is

1 currently doing business in the State of Arizona. At all times relevant hereto, Fender was
2 Johnston's "employer" as defined in the ADA.
3

JURISDICTION AND VENUE

5 3. All acts complained herein occurred in Maricopa County, Arizona, and this
6 Court has jurisdiction over the parties and subject matter set forth in this Complaint
7 pursuant to the ADA.
8

9 4. This Court has federal question subject matter jurisdiction over Plaintiff's
10 claims pursuant to 28 U.S.C. § 1331 in that the claims set forth in this Complaint arise
11 under federal law.
12

13 5. The employment practices alleged to be unlawful were committed within,
14 and had their primary effect in, the jurisdiction of the United States District Court for the
15 District of Arizona.
16

17 6. Plaintiff has exhausted all administrative and statutory prerequisites
18 necessary to commence this action, and therefore jurisdiction is proper.
19

20 7. Personal jurisdiction in this Court is proper.
21

22 8. Venue in this Court is proper.
23

FACTUAL ALLEGATIONS

24 9. Johnston commenced employment with Fender in 2007 as a Collection
25 Specialist, working most recently as an Accounts Payable Specialist.
26

27 10. Johnston consistently met and exceeded expectations on annual performance
28 reviews.
29

30 11. In July of 2010, Johnston sustained a traumatic head injury causing three
fractures in her skull and several broken ribs. She required approximately three months of
31

1 medical leave for physical therapy before she could return to work.

2 12. Aside from the medical leave, Johnston did not request additional
3 accommodations in 2010 and could perform the essential functions of her position without
4 an accommodation.

5 13. Beginning in 2016, Johnston started experiencing intense migraines and
6 sought treatment from a neurologist.

7 14. After an MRI test, it was discovered that Johnston's fractures were widening.

8 15. Johnston's migraines were attributed to the fact that her skull fractures were
9 widening.

10 16. When Johnston is suffering from a migraine headache, she requires medical
11 leave as an accommodation.

12 17. The lasting consequences of Johnston's injury also cause various mental
13 impairments that affect Johnston's ability to think, concentrate, communicate, recall
14 information, learn, and read.

15 18. Johnston also began to suffer from brief periods of confusion and memory
16 loss, which were also attributed to the fact that her skull fractures were widening.

17 19. The periods of confusion and memory loss are symptoms caused by her brain
18 injury.

19 20. Early in 2016, Johnston informed her supervisor, Finance Manager Michelle
20 Sease, that she was experiencing migraine headaches and periods of confusion due to her
21 injury.

22 21. Johnston also informed Sease that she needed assistance during periods of
23 confusion if Johnston could not remember specific protocols related to marginal functions

1 of her job.

2 22. Nonetheless, and despite the symptoms of her disability, neither Sease nor
3 anyone else at Fender communicated that Johnston was exhibiting poor work performance
4 at that time.

5 23. Johnston requested accommodations in this manner monthly in meetings
6 with Sease.

7 24. On each occasion, Sease would promise to modify Johnston's work
8 expectations because Johnston has a disability.

9 25. Sease did not modify Johnston's work expectations, did not provide her with
10 assistance during periods of confusion, did not report her accommodation request to human
11 resources personnel, and did not inform Johnston that she was eligible for intermittent
12 FMLA leave.

13 26. For the first nine months of 2016, Sease took no action at all in response to
14 Johnston's accommodation requests.

15 27. On at least one occasion, Sease told Johnston that she cannot use her
16 disability as an excuse for needing help or completing tasks.

17 28. After attending approximately nine monthly meetings and requesting
18 accommodations without any meaningful response by Sease, Johnston complained to Tony
19 Gianforte, Defendant's Controller.

20 29. On or about October 8, 2016, Johnston informed Gianforte that she had a
21 disability and that Sease refused to assist her with any accommodations.

22 30. Gianforte promised to inform human resources personnel that Johnston was
23 in need of accommodations.

1 31. Only one week later, Johnston was issued unprecedented corrective action
2 by Sease.

3 32. Johnston had not been previously disciplined throughout her ten years of
4 employment with Fender.

5 33. Sease claimed Johnston had too many errors on entries of invoices.

6 34. At that time, there was no objective method to evaluate error rate in the
7 Finance Department.

8 35. Three months later, in January 2017, that the Finance Department imposed
9 five new performance guidelines that measured percentage of errors, among other metrics.

10 36. The Department would audit ten percent of invoices sent weekly by each
11 account specialist to review for errors in an “Error Report.”

12 37. In March 2017, Johnston was audited. Johnston’s supervisor, Senior
13 Accounts Payable Specialist Brandi Strombeck, indicated that Johnston had failed her
14 audit.

15 38. Strombeck identified errors in Johnston’s invoices that occurred prior to
16 December 2016—before the Error Report method was even imposed.

17 39. Strombeck insisted that she had discretion to determine whatever
18 performance metrics she believed appropriate, even if they deviated from the written
19 performance metrics.

20 40. Because she believed that she was being discriminated against, Johnston
21 informed Strombeck that she intended to record all personnel meetings and was given
22 permission to do so by Strombeck.

23 41. On April 27, 2017, Johnston complained to Fender’s human resources

1 personnel, Margie Cashdan, that similarly-situated comparators were not disciplined for
2 errors on important invoices, but that she was being harshly reprimanded for little or no
3 reason at all.
4

5 42. Johnston also complained that Strombeck was overly scrutinizing her work
6 performance.
7

8 43. Cashdan simply instructed Johnston to resolve the issues with Strombeck
9 herself.
10

11 44. Only weeks later, Strombeck once again attempted to discipline Johnston
12 claiming that there were errors in Johnstons' work product.
13

14 45. Instead of conducting a standard Error Report, Strombeck reviewed
15 Johnston's entire work history and pulled invoices that contained inconsequential errors,
16 some of which were up to six months old.
17

18 46. Strombeck scored Johnston at 86%, which included errors from six months
19 earlier.
20

21 47. Johnston once again complained to Cashdan that the disciplinary action was
22 not being evenly enforced and that she was being singled out.
23

24 48. Cashdan agreed that the write-up was not appropriate and modified
25 Johnston's score to a satisfactory score of 90% accuracy, effectively invalidating the
26 proposed disciplinary action.
27

28 49. Strombeck insisted that Johnston should be held to a 95% accuracy rate
despite admitting that nobody else in the Finance Department was expected to maintain
that accuracy rate.
50.

Strombeck imposed a final written warning against Johnston only four days

1 later, on or about June 2, 2017.

2 51. Strombeck admitted that Johnston's May weekly audit revealed 0% errors,
3 but insisted that other mistakes discovered from November and January merited a final
4 written warning.

5 52. During this same meeting, Strombeck and Cashdan offered Johnston
6 \$5,000.00 to resign.

7 53. Instead of resigning, Johnston requested FMLA leave due to stress caused by
8 her continued harassment, which triggers symptoms of her disability such as migraines and
9 psychological distress.

10 54. Johnston also submitted a comprehensive complaint to Fender Human
11 Resources unambiguously complaining of disability discrimination and retaliation.

12 55. Johnston's physician determined that she needed medical leave until
13 September 18, 2017.

14 56. Johnston complied with all directives to submit medical documentation and
15 signed a release for Fender to speak directly to her treating physician.

16 57. Johnston exhausted FMLA leave.

17 58. Five days before the expiration of her medical leave, on or about September
18 13, 2017, Johnston submitted medical documentation requesting to extend her medical
19 leave until October 16, 2017.

20 59. Fender indicated that the note was insufficient to merit an extension of her
21 medical leave and instructed Johnston to contact Jacquelyn Kreuger, Senior HR Business
22 Partner by September 22, 2017.

23 60. As directed, Johnston contacted Kreuger in order to discuss her continuing

1 need for medical leave and eventual return to work in October.

2 61. Kreuger acknowledged that Johnston's doctor's note stated that she could
3 return to work on October 16, 2017.
4

5 62. Nonetheless, Kreuger requested additional medical documentation
6 indicating the "probability" that Johnston would actually be able to return to work on
7 October 16, 2017.
8

9 63. Despite the excessive nature of the request, Johnston agreed to provide the
10 additional medical documentation requested.
11

12 64. During the phone call, Johnston repeatedly insisted that she could perform
13 the essential functions of her job position with or without an accommodation as she had
14 been doing in a satisfactory manner for ten years.
15

16 65. Johnston indicated that she would need periodic sick days when she returned
17 due to her migraines.
18

19 66. Johnston also complained about the discriminatory treatment she received
20 from her supervisors.
21

22 67. On or about September 27, 2017, Fender denied the extension of Johnston's
23 requested medical leave, and claimed that "there is not an appropriate accommodation that
24 would allow [her] to perform the necessary job duties...."
25

26 68. Fender neglected to identify any essential functions that Johnston could not
27 perform.
28

29 69. Fender also did not claim that providing an additional 19 days of leave would
30 amount to undue burden.
31

32 70. In response to Fender's September 27, 2017 letter, Johnston requested
33

1 reassignment to a vacant position as an accommodation.

2 71. Fender responded with a termination letter on October 10, 2017.

3
4 **COUNT I**
DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT

5 72. Plaintiff reasserts and realleges each and every allegation in this complaint
6 as if fully set forth herein.

7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 73. The ADA prohibits discrimination against a qualified individual with a
disability in regard to terms, conditions and privileges of employment. 42 U.S.C. §
12112(a).

74. Plaintiff has a physical or mental impairment that substantially limits a major
life activity.

75. In the alternative, the length of time during which Plaintiff has experienced
symptoms, and for which she will continue to suffer from, constitutes a record of
impairment.

76. In the alternative, Plaintiff was regarded as having a disability under the
ADA.

77. Defendant is an employer under the ADA.

78. Defendant knew of Plaintiff's physical and mental limitations.

79. Defendant treated Plaintiff disparately as compared to other similar situated
non-disabled employees because of her disability.

80. Plaintiff is qualified to perform the essential functions of her position.

81. Defendant failed to accommodate Plaintiff.

82. Defendant requested excessive medical documentation.

83. Defendant failed to engage in the interactive process in good faith.

84. Defendant discriminated and retaliated against Plaintiff by failing to provide her with reasonable accommodations, failing to engage in the interactive process in good faith, and terminated her due to her disabilities. See 42 U.S.C. § 12112(b).

85. Accommodating Plaintiff's reasonable requests would not inflict undue hardship on Defendant.

86. Plaintiff's reasonable requests would not pose a direct threat to the health or safety of other individuals in the workplace.

87. Plaintiff's disability was the but-for cause of Defendant's discriminatory conduct.

88. As a direct, intentional, and willful consequence of such illegal conduct, Plaintiff suffered adverse employment actions including, *inter alia*, termination of employment

89. As a result, Plaintiff has been damaged in an amount to be proven at trial.

COUNT II
RETALIATION IN VIOLATION OF THE AMERICANS WITH DISABILITIES
ACT

90. Plaintiff reasserts and realleges each and every allegation in this complaint as if fully set forth herein.

91. The ADA prohibits discrimination against any individual because such individual engaged in protected activity under the ADA. See 42 U.S.C. § 12203(a).

92. Plaintiff engaged in protected activity by requesting reasonable accommodations under the ADA and by complaining of disability discrimination on multiple occasions.

93 Defendant retaliated against Plaintiff by failing to provide her with

reasonable accommodations and terminated her due to her complaints.

94. Plaintiff's complaints was the but-for cause of Defendant's retaliatory conduct.

95. As a direct, intentional, and willful consequence of such illegal conduct, Plaintiff suffered adverse employment actions including, *inter alia*, termination of employment.

96. As a result, Plaintiff has been damaged in an amount to be proven at trial.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant Fender, as follows:

- A. An award of damages for all counts in an amount to be proven at trial;
- B. An award of compensatory and punitive damages in an amount to be proven at trial;
- C. An award of back pay and front pay;
- D. Pre- and post-judgment interest;
- E. Reasonable attorneys' fees, costs and other expenses;
- F. Any other remedies or judgments deemed just and equitable by this Court.

JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues so triable.

RESPECTFULLY SUBMITTED January 9, 2018.

ZOLDAN LAW GROUP, PLLC

By: /s/ Jessica Miller

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Attnorneys for Plaintiff Kimberley Johnston

VERIFICATION

Plaintiff Kimberley Johnston declares under penalty of perjury that she has read the foregoing Verified Complaint and is familiar with the contents thereof. The matters asserted therein are true and based on her personal knowledge, except as to those matters stated upon information and belief, and as to those matters, she believes them to be true.


Kimberley Johnston

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